Introduction

> During the hearing at the High Court of Justice, the judges pressured Adv. Rosenthal to clarify whether an interrogator would be allowed to use force when a 'ticking bomb' is considered. Justice Heshin illustrated: 'supposing a bomb was planted inside the Shalom Tower [a multi-storey building in the heart of Tel-Aviv], and the interrogee knows. It will explode in two hours. It is impossible to evacuate people out of the building. What do I do in such a situation?' Rosenthal refused to admit that in such a situation it would be permissible to use force during interrogation. Heshin responded: 'this is the most extreme immoral position I have ever heard. A thousand people are about to die, and you propose to do nothing?'[1]

Should twenty-first century democratic states facing terrorism use torture in the interrogation of terrorists suspects, at least in extreme, 'ticking bomb situations'? This study leads to this question, and attempts to answer it.

A 'ticking bomb situation' (TBS) is, as in the scenario described by Justice Heshin, where the torture of a terrorist suspect seems to be the only means of obtaining urgently-needed information crucial for the thwarting of planned terrorist attacks which, if carried out, are likely to kill many innocent civilians.

In this book, I will approach the TBS question from three interrelated angles: as a question of private morality; as a question of public, applied morality (or 'practice'); and as a question of law, modifying the scenario slightly to suit each context. I will address what I consider to be the most important issues raised by approaching the question from each of these angles.

The choice of the word 'should' in the original question and of the particular angles from which to address it, reflect this study's orientation. Laws prohibit torture everywhere. But should they? Where appropriate I will analyse the law as it currently stands, but ultimately I will ask (and try to answer) whether this prohibition must remain in its current, absolute form. This is a meta-legal question, and so this study will need to assume the form of a moral-philosophical debate, a discussion of applied ethics, or a human rights NGO report, as often as that of a legal analysis.

Part I examines torture in a TBS as a question of 'pure' private morality: by private I mean that it is a lone, non-official individual who faces the terrorist and the dilemma. By 'pure' I mean a laboratory-type situation where the would-be

[1] HCJ 8049/96 *Muhammad 'Abd al- 'Aziz Hamdan v the General Security Service*, hearing of 14 November 1996, as described by the Israeli newspaper *Haaretz* (15 November 1996). In December 1996, Adv Rosenthal confirmed to the present writer (henceforth: I, me etc) that these were in fact Justice Heshin's words.

torturer's actions will have no 'ripple effects' on society, the law, and so on, and that she knows the facts with absolute certainty: the person is definitely a 'knowledgeable' terrorist, the bomb has definitely been planted, torture—and only torture—will definitely thwart the planned explosion and avoid the massive death toll which would otherwise result.

If the question ultimately concerns states in the real, uncertain world, why choose the doubly-unlikely scenario of a situation free of uncertainties and a choice faced by a private individual?

My answer is five-fold. Firstly, presenting extreme, 'pure' scenarios is a legitimate, oft-used technique in ethical debates—we will encounter a few illustrations in the discussion below. Charles Krauthammer, who makes this point convincingly, concludes that once the justifiability of torture in extreme situations is established in principle, 'all that's left to haggle about is the price'.[2] This is essentially true, albeit oversimplified, as even accepting both this argument and (at least *arguendo*) the justifiability of torture in the 'pure' scenario, it can—and will—be argued that the price may nevertheless be too high once torture is used by officials in the real world.

Secondly, humans can never be 100 per cent sure of the future, and writers have come up with scenarios that are clearly, perhaps deliberately, absurd, such as terrorist bombs that 'will kill hundreds of millions of people'.[3] However, it can reasonably be claimed that, particularly in states facing frequent terrorist attacks, situations similar to a 'pure' TBS have indeed taken place, and more importantly, that situations not departing from the 'pure' TBS enough to change its basic moral contours are possible. In fact, one state has actually provided statistics according to which dozens of 'ticking bomb' situations (so named) requiring the use of torture (not so named) to save lives occurred during each of two consecutive years. Backed as they are by the State Attorney (in individual cases) and based, in both instances, on confidential state information, I for one have no means of refuting these claims.

Thirdly, at least one state, and several writers, have opted for what I call 'eat-your-cake-and-have-it' solutions, or models; one involves preserving an absolute legal prohibition on torture, but with individual interrogators who torture granted immunity if the situation is judged, *ex post*, to have been a TBS. In these cases, the state and its laws purport to withdraw into the shadows during the TBS, leaving an individual to face a private dilemma. Whether such withdrawal is possible will be among the issues addressed in later Parts of this book.

Fourthly, I will argue (in Part II) that in extreme situations, no two moralities exist—one for individuals, one for states—so the dilemma is one and the same (see more below).

[2] Charles Krauthammer, 'It's time to be honest about doing terrible things', *The Weekly Standard* (5 December 2006).

[3] KE Himma, 'Assessing the Prohibition Against Torture' in SP Lee (ed) *Intervention, Terrorism and Torture: Contemporary Challenges to Just War Theory* (Dordrecht: Springer, 2007) 235–48, 238.

Finally, a TBS is where the torture-justifying argument is at its strongest, and being an anti-torture absolutist,[4] it is only fair that I allow the rival view the opportunity to 'give it its best shot'.

In Part I, I hope to facilitate, using a 'pure', private TBS, a 'clean' discussion of the moral[5] question which is essentially, I believe, whether the morality of human action should ultimately be open-ended or be constrained by some form of absolutism, however minimal, with emergencies setting the scene for such '*ultimum*'. More specifically, the question is whether the prevention of a catastrophe involving 'disastrous consequences' justifies resort to torture—or whether torture must, morally, be prohibited absolutely, regardless of the consequences. In other words, should a person facing this choice essentially compare the pain of the dead, wounded and bereaved innocent civilians which will result from the explosion of the bomb with that of the terrorist being tortured, or should she consider the immorality of one human being torturing another to be an inherent, unassailable immorality, which cannot, can *never*, yield to such 'cost-benefit' calculations?

Examining these issues will require a discussion of certain general theories of ethics and the controversy among them, before taking the issue of torture as a case in point. I believe it is impossible to offer a thesis on torture in a TBS without addressing what is perhaps the most enduring 'clash of the Titans' among ethicists—utilitarianism versus deontology. However, this will be done only to the extent necessary to answer the question posed. In order to provide my (negative) answer to the 'pure' moral question, it would suffice, I will submit, to use an idea, or a device, which I call 'minimal absolutism', rather than a whole new (or old) theory of morality or ethics. My discussion of the debate around moral absolutism, namely the question of whether or not there are moral 'no-go' areas (ie acts that no-one may ever perform) and attempt to show that the position denying any and all absolute prohibitions is untenable, will produce the logical 'minimal absolutist' conclusion, namely that there must be at least one type of act that is, morally, prohibited absolutely. Next I will argue that torture is, logically, the candidate *par excellence* for such absolute prohibition and, in much greater detail, that this conclusion holds beyond the confines of logic, through a discussion of what the act of torture means and entails, and an analysis of the moral situation in which each of the 'participants' in the TBS scenario would find themselves—the torturer, the tortured terrorist, and the innocent civilians who would be the victims of the bomb, should it explode.

That there are no two different sets of morality, or ethics, for private and public life respectively, at least as regards extreme situations, needs logically to be established for the examination of the 'pure' private case to be relevant to the

[4] Whatever descriptions fit this book, the reader will very soon discover that 'a thriller' is not among them.

[5] For the sake of simplicity, I have chosen to use 'moral' and 'ethical' interchangeably.

actions of states (or agents of states). This is done at the beginning of Part II. This Part then recasts the moral question in two significant ways: as a question facing a state rather than an individual; and as a question posed in the world as we know it rather than in a 'pure', doubt-free environment. The first change will entail the addition of society-wide and long-term repercussions of actions to our considerations; the second will mean that other issues, blocked artificially out of the scenario in Part I to ensure its 'purity', such as uncertainty as to the facts and the generally murky nature of real-life situations, will now have to be taken into account.

The bulk of Part II is devoted to an analysis of what happens once a state has opted to allow torturing in TBSs. Since such an option entails, as is shown in Part I, the adoption of a utilitarian morality in the case of extreme situations (or at least in this particular one), Part II mostly examines utilitarian, or what is termed popularly 'slippery slope', dangers of allowing state agents to torture, be it only in a TBS. The 'slippery slope' argument against torture is essentially that once allowed, torture will spread far beyond TBSs, and that society and indeed the international community will be adversely affected by its introduction in a host of other ways, to the extent that allowing torture in TBSs may actually cause more harm than good. This will be done by examining both theoretical 'slippery slope' implications of state resort to torture and those which have emerged from the real practice of states that have resorted to anti-terrorist torture in the twentieth and early twenty-first centuries. The discussion will first focus on 'slippery slope' dangers relating to the immediate context of interrogations, including the difficulties of how to determine issues such as the immediacy of the need to torture; certainty as to the facts; and deciding whom to torture; as well as the effectiveness of torture in comparison to humane interrogation methods. Then the broader, society-wide and worldwide dangers of opting for torture will be examined and illustrated, including that torture, once introduced, would inevitably be institutionalized, necessitating the training and involvement of a wide array of professionals; that it would legitimize other inhumane methods in fighting terrorism; that it would legitimize the torture of other, non-terrorist suspects; that it would have the effect of prolonging and exacerbating conflicts; and that legalizing interrogational torture in TBSs at international law would make violations of the ban on (other) torture well-nigh impossible to condemn and detect, let alone stop. Abu Ghraib is the obvious recent example, but others will also be provided. The overarching question of whether, as a society (and a world) we should give governments the power to do *anything* with a human being under their control if the stakes are high enough will be addressed in the conclusion of this Part.

Parts III and IV focus on the legal aspect, or aspects, of states practicing or allowing torture in TBSs or similar situations. This will be done, first, through examining models of legalized torture, in one case the more cautious term

'quasi-legalized torture' has been preferred. The models to be examined, in Part III are:

- the Landau model in Israel;
- the 'torture warrants' model;
- the High Court of Justice (HCJ) model in Israel;
- the 'high-value detainee' (HVD) model in the USA's 'war on terror'.

Of these, the second one is also the only model that is theoretical, namely, that has only been suggested by writers rather than actually implemented by any state, although I will submit that the Landau model did in fact function, to an extent, also as a 'torture warrants' model. The other three models are 'real life' ones: the Landau model was set out in a document adopted by the Israeli government in 1987, which established methods for interrogating suspected terrorists and outlined the legal (and moral) framework within which they were practised in Israel between 1987–1999; the HCJ model, which succeeded the Landau model following a ruling by Israel's Supreme Court, sitting as High Court of Justice (HCJ) and applied in that country between the date of the ruling, in September 1999, and the time at which this study was completed; and the USA's model of 'quasi-legalized torture' in the interrogation of detainees, to be applied, in theory, only to HVDs captured during the 'war on terror' that is declared in the wake of the 11 September 2001 terrorist attacks on its territory.

The two Israeli models have, I will submit, legalized torture in all but name, and certainly did so in practice, including legal practice. For the Landau model, legalization occurred through Supreme Court rulings supporting, and even praising, the system in general and allowing the specific, torturous techniques permitted under it to be carried out. For the HCJ model, legalization occurred through the 1999 Supreme Court ruling, which determined that torturers (not so named) in a TBS may be exempt from criminal liability and even prosecution, and setting up a system where, on the one hand, dozens, if not hundreds (or, by now, even more), have been tortured while, on the other, not a single torturer has been prosecuted. Both models relied, legally, on the 'defence of necessity' (DoN), the former as a basis for the compilation of detailed instructions on how to use physical and psychological 'pressure' during the interrogation of terrorists, the latter, as a plea available *ex post facto* to the 'individual interrogator' who decided to torture in a TBS.

The HVD model is far less clear, much more diffuse, and has been constantly changing. It originally combined a great deal of secrecy; Presidential decrees stripping certain detained terrorist suspects of any legal protection, including the right to 'humane treatment'; a series of memoranda by Ministry of Justice and Defense lawyers, two of them explicitly declaring that the President has power under the US Constitution to order torture during war, that the defences of 'necessity' and 'self-defence' applied to those who torture, and that torture was limited to the

most extreme acts while 'cruel, inhuman or degrading treatment' need not be criminalized, thus allowing for most of the interrogation methods envisaged by these memoranda; and, at least for a while, acceptance by the (lower) federal courts that the treatment of foreign detainees by US officials on foreign soil was beyond their jurisprudence. In practice, this led to the composition of elaborate lists of interrogation techniques, applied widely, probably too widely, and probably excessively (in the model's own terms) in the USA's various detention centres around the globe. Later, the veil of secrecy over much of this model was lifted; the Supreme Court ruled that federal courts had jurisdiction over at least those detained in Guantánamo Bay and that international humanitarian law applies to them; some of the memoranda were withdrawn and replaced; the President declared that he would not allow, let alone order, torture, and he even signed new laws prohibiting the use of cruel, inhuman or degrading treatment in the interrogation of any person under US control. The new laws, however, granted sweeping *ex post* immunity from prosecution to 'good faith' torture. Moreover, in 2007 a model of 'quasi-legalized torture' prevails, in the continued detention of hundreds beyond the full reach of the law, and the continued CIA program under which HVDs may be held in total isolation in secret, incommunicado detention for months and years, with a variety of other methods used in their interrogation. These practices are clearly unlawful, indeed torturous (at least with the accumulation of time and methods) under international law, but perfectly legal under US law (or at least the administration's interpretation thereof). US courts have so far been reluctant to challenge this interpretation, and these practices.

The discussion of the models will not be purely theoretical and legal—it will also provide detailed descriptions of the models' practical aspects, including the interrogation methods used in each model and the extent to which torture was used beyond the restrictions which the models purported to impose.

What I consider to be the salient legal questions arising from the models examined will be addressed in some detail, in Part IV. In another 'eat-your-cake-and-have-it' position some states—and writers—have advocated that you can 'coerce' terrorists into providing life-saving information without torturing, indeed without breaking international law at all. In view of this, the 'definitional' aspects of methods of interrogation used under the models ('torture lite', 'moderate physical pressure' and the like) and the scope of the international legal ban on torture and other cruel, inhuman or degrading treatment or punishment will first be examined. Next the 'defence of necessity', already mentioned here, will be analysed in detail. This humble criminal law defence became the cornerstone of the two Israeli models, has formed a part, albeit hitherto a passive (or secret?) one, of the US HVD model, and has been recommended by several theorists as the ideal solution for the TBS dilemma. Moreover, in its torture-justifying form the 'defence of necessity' fully and explicitly reflects the 'lesser evil' moral view of the torture-justifying ethicists. I will therefore examine the question of whether the 'defence of necessity', as it now stands at both the domestic and international

levels can provide the key to justifiably torturing terrorists in TBSs and saving the innocent while avoiding the 'slippery slope' and other long-term, society-wide and global dangers described in Part II. Finally, the question of the compatibility of the 'defence of necessity' model with the realities of states facing terrorism at the beginning of the twenty-first century will be addressed.

In concluding this study I will attempt to show how the different angles from which the torture in a TBS question have been examined may be seen as mutually complementary.

This study definitely takes sides—it presents and defends a very clear thesis: an absolute opposition to the use of torture (and other ill-treatment) under any circumstances and a total rejection of any attempt to justify or legalize its use. Nevertheless, I have made every effort to do so while presenting other views and arguments fairly and respectfully.